ALEXANDER L.
CLER

No. 80-1473

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

LUANN STEVENSON - - - - Petitioner

versus

GARY RAY STEVENSON - - - Respondent

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT, GARY RAY STEVENSON

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TABLE OF AUTHORITIES

PAGE

Kentucky Revised Statute (K.R.S.) 403.270..4, 5, 6, 7, 9, 10
Kentucky Revised Statute (K.R.S.) 403.340.....5, 6, 7, 8, 9
Atwood v. Atwood, Ky., 550 S. W. 2d 465 (1976)....5, 7–8
Eviston v. Eviston, Ky., 507 S. W. 2d 153 (1974)..... 6
S. v. S., Ky. App., 608 S. W. 2d 64 (1980) Appendix.. 7– 9
Martin v. Thies, 64 L. Ed. 491 ____ U. S. ____ 100 S. Ct. 1744 (1980)..... 11

QUESTION PRESENTED

Whether the Kentucky Court of Appeals, in deciding the custody of an infant child, can consider the homosexual life style of the mother in determining that the child's present environment may endanger her physical, mental, moral or emotional health and award custody to the father based on the best interest of the child.

INDEX

	PAGE
Question Presented	i
Table of Authorities	iii
Statement of the Case	1– 3
Reasons Why the Writ Should Not Be Granted	4–10
Conclusion	11
Certificate of Service	12
Appendix	13–16

SUPREME COURT OF THE UNITED STATES

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No. 80-1473

LuAnn Stevenson - - - - *Petitioner*

v.

Gary Ray Stevenson - - - *Respondent*

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT, GARY RAY STEVENSON

STATEMENT OF THE CASE

The parties to this action were divorced on January 12, 1977 in the Jefferson Circuit Court in Louisville, Kentucky. The Respondent, Gary Ray Stevenson, was not represented by counsel and agreed that the Petitioner should have the custody of their infant daughter, Shannon Louise Stevenson, born on April 24, 1976.

The Respondent, after being advised by the former wife that she was a lesbian and living with another lesbian, filed for a change of custody on or about November 15, 1977 in the Jefferson Circuit Court. The mother was then employed by "Mother's Brew," a bar for women only, as a night bartender.

The Petitioner admitted the homosexual relationship and called as one of her witnesses the lady that she lived with under this arrangement.

The Respondent, Gary Ray Stevenson, had remarried and established a home. His present wife, Donna, was then employed by the Jefferson County Board of Education and had been awarded a scholarship at the University of Arizona, where she has since completed her work on a Master's Degree in Special Education. Respondent at that time had graduated from the University of Louisville and was employed. Gary and Donna presented to the Court a stable home for the Respondent's young daughter and both parties wanted the change in custody.

The Jefferson Circuit Court on its own motion referred the parties to Dr. J. Carleton Riddick for an evaluation as to whether it was in the best interest of the child to be raised in the homosexual relationship; and, for an evaluation, Dr. Riddick reported to the Court as follows:

> "Without question, in my opinion, there is social stigma attached to homosexuality. Therefore, Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. Speculating from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future. There would seem to me to be no rational reason for purposely submitting a child to these additional and potentially debilitating influences."

Dr. Riddick further felt that the Respondent, Gary Ray Stevenson, was able to offer more in terms of

traditional stability; that is, home life, middle-class values, and so forth. Dr. Riddick further described the present wife, Donna

> "In my opinion, she is the most stable person in this situation."

He made it clear that they could provide the best environment for Shannon and that the best interest would be with the father.

Dr. Allen Bloom, who testified in behalf of the Petitioner, admitted under cross-examination that it would be best for Shannon to be reared properly by two normal, sexually oriented people. His answer being "Looking at it in a very abstract manner, yes." He further testified that homosexuality still carries with it a stigma of the general public. Even though he could not find any abnormal conditions in Shannon at the time his evidence was given, he admitted and testified that the child had not been subjected to the conditions for a sufficient period of time to develop any noticeable abnormalities.

The Jefferson Circuit Court overruled the Respondent's motion for a change in custody. The Kentucky Court of Appeals reversed the Jefferson Circuit Court and their Opinion is attached to this Brief in the Appendix and is reported as S. v. S., Ky. App., 608 S. W. 2d 64 (1980).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Counsel for Respondent states that the Courts have for many years in cases involving the custody of minor children taken into consideration all the circumstances of each particular case and awarded the custody in such a manner as may appear best calculated to secure for them proper care and attention as well as education. In other words, the welfare of the child is the chief consideration. The dominant thought is that children are not chattels, but intelligent and moral beings; and that as such, their welfare and their happiness are of first consideration. The welfare of the child is superior to the desires of either parent. Neither parent has a paramount right over the other to the custody of a minor child.

The Court of Appeals of Kentucky in this case, in making their decision, had to take into consideration the following statutes governing a change in custody:

"K.R.S. 403.270

(1) The Court shall determine custody in accordance with the best interest of the child. The Court shall consider all relevant factors including:

(c) The mental and physical health of all individuals involved.

(2) The Court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

"KRS 403.340

(1) No motion to modify a custody degree may be made earlier than two years after its date, unless the Court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health."

In addition to the foregoing statutes, the courts in Kentucky have for many years adhered to the rule that the best interest of the child shall determine between the parties as to whom is awarded the custody of the child. In the recent case of Atwood v. Atwood, Ky., 550 S. W. 2d 465 (1976), the Court stated:

> "A custody action is a civil proceeding of momentous proportions. It not only affects the parents but dramatically and drastically affects the lives of the children. Regardless of the desires of the parents, in making an award of custody the polar star is to determine what is for the best interest of the child. In making this determination, the court must, among other things, consider the following:
>
> '403.270, Custody—Best interest of child shall determine' "
>
> "If a court of this state has jurisdiction pursuant to the uniform child custody jurisdiction act, the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is

necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

> (c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages."

"In every custody proceeding (KRS 403.270) and in every proceeding for the modification of a custody decree (KRS 403.340), the mental and physical health of not only the parents but of the child is of great concern and importance to the court. Whenever custody of infants is in dispute, the parties seeking custodial authority subject themselves to extensive and acute investigation of all factors relevant to the permanent and, hopefully, proper award of custody. Of major importance is the mental and physical health of all the parties and whether the child is in an environment likely to endanger his physical, mental, moral or emotional health."

See also Eviston v. Eviston, Ky., 507 S. W. 2d 153, which states:

> "The overriding issue in a child custody case is what is for the best interest of child."

The Opinion of the Court of Appeals of Kentucky in awarding the custody of Shannon to the father, Gary Ray Stevenson, clearly sets out that they have examined the evidence presented and have made their

decision based upon a long line of cases that have followed the "Best Interest of the Child Rule" in awarding custody. They have also followed the applicable statutes that spell out the applicable legal standards, K.R.S. 403.270 as set out previously and K.R.S. 403.340. The Opinion states as follows, S. v. S., Ky. App., 608 S. W. 2d 64 (1980):

> "The appellee would require this Court to determine whether lesbianism is, as a matter of law, sufficient to justify a change of custody. We are unwilling to assume this burden as the lower court did. Instead, we feel that the question is whether this deviate practice is sufficient, in this case, to warrant the change. Thus we must examine the evidence herein and determine the applicable legal standard.
>
> "Appellant contends that the overriding and omnipresent consideration is 'the best interest of the child'; the appellee urges that the sole standard is whether there is a present showing that the environment has already affected the child. Neither is totally correct. It is obvious to this Court that the purpose of KRS 403.340(1) is to provide stability and finality to a custody decree and, in our opinion, creates an assumption that the present custodian shall continue custody for the first two years unless it is shown (1) that the environment may endanger the physical, mental, moral or emotional health of the child; and (2) that the stability of consistency is outweighed by the advantages attendant to change. Also, as Justice Sternberg stated in Atwood v. Atwood, Ky., 550 S. W. 2d 465 (1976), '. . . the polar

star is to determine what is for the best interest of the child.'

"The key word in KRS 403.340 is the word 'may.' We do not perceive that this word connotes that the injury to the 'physical, mental, moral or emotional health' must have already occurred or be occurring at the present time. The potentiality for such danger is the test and the courts are not required to wait until the damage is done.

"Applying these standards to the present case, we examine the testimony of the examining psychologists. The psychologist appointed by the court, in his report, stated as follows:

> (Homosexuality) raises serious issues in terms of the child's future.
>
> * * *
>
> Without question, in my opinion, there is social stigma attached to homosexuality. Therefore, Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. Speculating from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future. There would seem to me to be no rational reason for purposely submitting a child to these additional and potentially debilitating influences.

"Such evidence, we feel, meets the burden of proof required by the statute. See Wilcher v. Wilcher, Ky. App., 566 S. W. 2d 173, 175 (1978). To refute this we have the testimony of the psychologist of

> the wife, who examined the child at age 2½. His testimony is almost entirely predicated on current conditions, with virtually no prediction on future possibilities. When questioned concerning the future, his response was '. . . I think the best I can say with this environment up until this time where there is no indication of abnormalities in the child.' The court appointed psychologist found both parents to be reasonably well adjusted but opined that appellant's second wife was 'the most stable person in the situation.' "

The reasoning set out by the Petitioner is in error regarding the Kentucky Court of Appeals failure to follow the statutory language of K.R.S. 403.340 and K.R.S. 403.270(2) and established a ultra vires standard which governed this case. The Court found from the evidence that the evidence presented met the requirements of K.R.S. 403.340. The Court was satisfied that the examining psychologists satisfied the requirements.

The psychologists testified that homosexuality raised serious issues in terms of the child's future. The evidence included the effects of parental modeling on children and the difficulties that this could cause Shannon in fulfilling heterosexual identity of her own in the future.

The Court also found that this evidence regarding the danger and possible effects on Shannon fully satisfied the requirement of K.R.S. 403.270(2). That required the Court not to consider conduct of a proposed custodian that does not affect his relationship to the child.

The open homosexual relationship of the Petitioner in the home certainly is in the presence of the child and this affects the Petitioner's relationship with the child. The Court's Opinion and the evidence set out in the Court's Opinion clearly reveals that the Court was correct in reaching their decision and was in accordance with the statutory requirements.

Petitioner's allegation that the Kentucky Court of Appeals failed to apply K.R.S. 403.270(2) to homosexual custodians and violated Petitioner's right to equal protection of the law. This allegation is best answered by examining the evidence of the psychologist appointed by the Court who made it clear that the Petitioner's homosexual relationship presented serious issues in terms of the child's future. The Court properly considered this conduct.

Petitioner advances the argument that the Court should rule on the fundamental right of homosexuals to retain continued custody of their children. This appears to Counsel for Respondent to be an attempt to simply urge this Court to grant a special right to homosexuals to retain custody of their children. This is merely a plea to condone homosexual conduct without regard to the effects that it may have on the children and disregards the best interest of the child.

CONCLUSION

Respondent urges the Court to deny the Petitioner's Writ of Certiorari as the Petitioner does not have any legal grounds for this Court to rule otherwise. We further submit that the State Court should be allowed to make the determination of custody matters. This Court so stated in the case of Martin v. Thies, 64 L. Ed. 491 —— U. S. ——, 100 S. Ct. 1744, wherein the Court stated:

> "Removed as I am from the active events at issue by nearly 3,000 miles and by several layers of judicial proceedings, I decline to make my own assessment of Sarah's best interests and instead defer to the amply supported conclusion of the Court below.
>
> "The application is accordingly denied."

Respondent further submits that the use of evidence by the Court of Appeals of Kentucky in reaching their decision based upon the "best interest for Shannon" was proper.

Wherefore, the Respondent, Gary Ray Stevenson, respectfully demands that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of March, 1981, ~~two~~ 3 copies of this Brief in Opposition on behalf of Respondent, Gary Ray Stevenson, were mailed, postage prepaid, to Mr. Robert Frederick Smith and Mr. Barry L. Master, 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202.

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APPENDIX

OPINION RENDERED: JULY 11, 1980; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 79-CA-1588-MR

S - - - - - - - - - - - *Appellant*

v.

S - - - - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Earl O'Bannon, Judge
Action No. 220098

REVERSING AND REMANDING

BEFORE: GANT, HOWERTON and VANCE, Judges.

GANT, JUDGE. (At the request of the appellant and without objection by the appellee, the names of the parties are withheld from this opinion.)

The appellant and appellee, husband and wife respectively, were divorced in January, 1977, the husband not being represented by counsel and agreeing that the custody of the infant daughter, then less than one year old, be placed with his wife. In the ensuing months, the wife began a lesbian relationship with a female companion. The extent of the relationship included working at a lesbian bar, moving the female companion into the home with the child, and exchanging vows and rings with this other woman in a mock wedding ceremony at the wife's place of employment. The wife denies any overt lesbian relationship in

the presence of the child and there is no proof to the contrary.

After learning of this situation, the husband filed a motion seeking change of custody, this motion being filed some ten months after the decree of dissolution. The court, on its own motion, referred the parties to a well qualified psychologist for testing. The psychologist conducted extensive tests and interviews with the husband, his present wife and the mother, but not the child. The mother employed an apparently equally qualified psychologist, who examined the child but no one else. Thus, this Court must examine the composite of the reports to arrive at a conclusion. The lower court, with considerable reluctance, denied the motion for change of custody.

The appellee would require this Court to determine whether lesbianism is, as a matter of law, sufficient to justify a change of custody. We are unwilling to assume this burden as the lower court did. Instead, we feel that the question is whether this deviate practice is sufficient, *in this case,* to warrant the change. Thus we must examine the evidence herein and determine the applicable legal standard.

Appellant contends that the overriding and omnipresent consideration is "the best interest of the child"; the appellee urges that the sole standard is whether there is a present showing that the environment has already affected the child. Neither is totally correct. It is obvious to this Court that the purpose of KRS 403.340 (1) is to provide stability and finality to a custody decree and, in our opinion creates an assumption that the present custodian shall continue custody for the first two years unless it is shown (1) that the environment *may* endanger the physical, mental, moral or emotional health of the child; and (2) that the stability of consistency is outweighed by the advantages attendant to change. Also, as Justice Sternberg stated

in *Atwood* v. *Atwood,* Ky., 550 S. W. 2d 465 (1976), ". . . the polar star is to determine what is for the best interest of the child."

The key word in KRS 403.340 is the word *"may."* We do not perceive that this word connotes that the injury to the "physical, mental, moral or emotional health" must have already occurred or be occurring at the present time. The potentiality for such danger is the test and the courts are not required to wait until the damage is done.

Applying these standards to the present case, we examine the testimony of the examining psychologists. The psychologist appointed by the court, in his report, stated as follows:

> [Homosexuality] raises serious issues in terms of the child's future.
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> Without question, in my opinion, there is social stigma attached to homosexuality. Therefore Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. Speculating from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future. There would seem to me to be no rational reason for purposely submitting a child to these additional and potentially debilitating influences.

Such evidence, we feel, meets the burden of proof required by the statute. *See Wilcher* v. *Wilcher,* Ky. App., 566 S. W. 2d 173, 175 (1978). To refute this we have the testimony of the psychologist of the wife, who examined the child at age 2½. His testimony is almost entirely

predicated on current conditions, with virtually no prediction on future possibilities. When questioned concerning the future, his response was ". . . I think the best I can say with this environment up until this time where there is no indication of abnormalities in the child." The court appointed psychologist found both parents to be reasonably well adjusted but opined that appellant's second wife was "the most stable person in this situation."

We express our appreciation for the research by the parties into this matter and particularly commend the trial judge for his independent research. This Court would call attention to an article entitled "Children of lesbians: their point of view" contained in the Journal of the National Association of Social Workers, Vol. 25, Number 3, May, 1980, p. 198, *et seq.* This article points out the fact that the lesbianism of the mother, because of the failure of the community to accept and support such a condition, forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers.

We are of the opinion that the lower court erred in failing to apply the standards of "best interest of the child" and potential for endangering the physical, mental, moral or emotional health of the child and that under the evidence herein we must reverse.

ALL CONCUR.

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